

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CITY ATTORNEY
2012 MAY 24 PM 2:37

Manuel H. Miller, Esq. (SBN 36947)
Max A. Sauler, Esq. (SBN 62634)
Michael Coletti, Esq. (SBN 135632)
LAW OFFICES OF MANUEL H. MILLER
A Professional Corporation
20750 Ventura Boulevard, Suite 440
Woodland Hills, California 91364
Telephone: (818) 710-9993
Facsimile: (818) 710-1938
Email: miller4law@msn.com

Attorney for Plaintiff PRESTON SMITH

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PRESTON SMITH, an individual,

Plaintiff,

vs.

CITY OF BURBANK, BURBANK
POLICE DEPARTMENT,
BURBANK POLICE
DEPARTMENT OFFICER
GUNN; BURBANK POLICE
DEPARTMENT OFFICER
BAUMGARTEN; BURBANK
POLICE DEPARTMENT
OFFICER EDWARDS, and DOES
1 through 100, inclusive,

Defendants.

CASE NO. CV 10-8840 R (AGR)

**MEMORANDUM OF CONTENTIONS
OF FACT AND LAW OF PLAINTIFF
PRESTON SMITH**

- 1 -

**MEMORANDUM OF CONTENTIONS OF FACT AND LAW OF
PLAINTIFF PRESTON SMITH**

Smith v. COB, et al.

5/21

1
2 Plaintiff, Preston Smith, hereby submits his Memorandum of Contentions of Law
3 and Fact as follows:
4

5 **I. Claims and Defenses**

6 (a) Plaintiff's Claims:

7 Claim 1 as against the Defendant Officers Gunn, Baumgarten and Edwards:
8 The Defendant Officers violated the Fourth Amendment to the Constitution.

9 Claim 2 as against the Defendants City of Burbank and the Burbank Police
10 Department: The Defendants City of Burbank and the Burbank Police
11 Department violated the Fourth Amendment to the Constitution.

12 Claim 3 as against the Defendant Officers Gunn, Baumgarten and Edwards:
13 The Defendant Officers violated California Code of Civil Procedure, section
14 52.1.

15 Claim 4 as against the Defendants City of Burbank and the Burbank Police
16 Department: The Defendants intentionally inflicted emotional distress.

17 Claim 5 as against the Defendants City of Burbank and the Burbank Police
18 Department: The Defendants committed Assault and Battery.

19
20 (b) Elements Required to Prove Plaintiff's Claim 1:

- 21 1. That the acts or omissions of the Defendant Officers were
22 intentional;
23 2. That the Defendant Officers acted under color of law;
24 3. That the acts or omissions of the Defendant officers were the legal
25 cause of the deprivation of the Plaintiff's constitutional rights as
26 defined by the Fourth Amendment.
27
28

1 4. That the Defendant Officers unconstitutional acts or omissions
2 were the legal cause of damages to Plaintiff.

3 Elements Required to Prove Plaintiff's Claim 2:

- 4 1. That the acts or omissions of the defendant officers were
5 intentional;
6 2. That the defendant police officers acted under color of law;
7 3. That the acts or omissions of the Defendant officers were the legal
8 cause of the deprivation of the Plaintiff's constitutional rights as
9 defined by the Fourth Amendment.
10 4. That the Defendant Officers unconstitutional acts or omissions were
11 the legal cause of damages to Plaintiff.

12 Elements Required to Prove Plaintiff's Claim 3:

- 13 1. That plaintiff timely filed a government claim and that the City of
14 Burbank denied the claim.
15 2. That each individual defendant, by threat, intimidation or coercion,
16 tried to or did prevent the plaintiff from doing something he had the
17 right to do under constitutional law, or to force the plaintiff to do
18 something that he was not required to do under Constitutional law.
19 3. That the threat, intimidation or coercion was egregious,
20 deliberate and not negligent.
21 4. That the threat, intimidation or coercion legally caused damage to
22 plaintiff.

23 Elements Required to Prove Plaintiff's Claim 4:

- 24 1. That plaintiff timely filed a government claim and that the City of
25 Burbank denied the claim.
26 2. That each defendant acted in an outrageous manner as to exceed
27 those bounds usually tolerated in a civilized society.

1 3. That each defendant intended to cause emotional distress or caused
2 emotional distress with reckless disregard of the probability of
3 causing said distress.

4 4. That plaintiff suffered severe emotional distress.

5 5. That each defendant's outrageous conduct was the proximate cause
6 of emotional distress.

7 6. That each defendant's conduct was no privileged.

8 Elements Required to Prove Plaintiff's Claim 5:

9 1. That the acts or omissions of the Defendant Officers were
10 intentional;

11 2. That the Defendant Officers acted under color of law;

12 3. That each Defendant's acts or omissions was the legal cause of
13 damage to plaintiff;

14 4. That each defendant's conduct was unprivileged.

15
16 (c) Key Evidence in Support of Plaintiff's Claims 1, 2, 3, 4, and 5:

17 1. On April 10, 2009 at approximately 11:30 p.m., Plaintiff was
18 stopped by Officer Gunn while walking with witness Mario
19 Champieux.

20 2. At the time of the stop, Mario Champieux allegedly threw
21 something into a bush.

22 3. Plaintiff Smith became nervous and fled on foot.

23 4. Officer Gunn gave chase.

24 5. Plaintiff Smith jumped over a wall and landed on the other side, on
25 his feet. Officer Gunn climbed up on the wall.

26 6. Officer Gunn deployed his taser and the charge struck Plaintiff
27 Smith in the back.

1 7. The force of the taser charge knocked Plaintiff face first into the
2 dirt.

3 8. Plaintiff Smith stayed where he was, stating "Ok, you've got me."

4 9. Officer Gunn then reached down and tasered Plaintiff Smith a
5 second time even though Smith was now immobile.

6 10. The charge from the second tasing struck Plaintiff in the back
7 and caused him great pain.

8 11. Plaintiff begged Officer Gunn to stop tasing him.

9 12. Officer Gunn then tasered Plaintiff Smith a third time.

10 13. Plaintiff began convulsing.

11 14. Plaintiff turned and saw Officer Gunn laughing and he became
12 scared for his life.

13 15. Plaintiff again begged Officer Gunn to stop tasing him.

14 16. Officer Gunn then tasered Plaintiff Smith a fourth time.

15 17. Plaintiff gasped for air as the tasing made it difficult for him to
16 breathe.

17 18. Officer Gunn tasered Plaintiff Smith a fifth and sixth time.

18 19. Other officers arrived after the tasing.

19 20. Plaintiff Smith was then told to turn on his stomach, and he did.

20 21. Officer Baugarten then dropped to the ground and put his knee in
21 Plaintiff Smith's back.

22 22. Plaintiff Smith felt a solid object strike him twice in the head. The
23 force of these blows caused Plaintiff Smith to bleed excessively.

24 23. Plaintiff's right arm was pulled and twisted back violently behind
25 his body, causing him physical injury.

26 24. Plaintiff suffered physical and emotional injuries as a result of
27 this assault, including blunt force trauma, lacerations, numbness in the
28

1 right upper extremity, as well as sprain/strain injuries to his back.

2 25. Later, Officer Gunn threatened Plaintiff Smith with the placement
3 of a 'snitch jacket' while he would be doing time jail and/or prison.

4 (d) Summary Statement of Defendants' Claims and Defenses

5 Defendant is expected to argue that Plaintiff failed to timely file a
6 government tort claim; that Defendants are immune under California
7 Government Code sections 815.2, 818, 820, 820.2, 820.8, 821.6(3).
8 Defendants are expected to denied the facts of the incident as alleged
9 by Plaintiff. Defendants are expected to seek summary judgment
10 based upon Plaintiff's guilty plea to resisting arrest and possession of
11 a controlled substance.

12 (e) Evidence Required for Defendants' Claims and Defenses

13 See Above

14 (f) (This section pertains only to Defendant's Memorandum)

15 (g) Other Parties

16 There are no other parties to the present lawsuit.

17 (h) Evidentiary Issues

18 Plaintiff intends to bring motions in limine to preclude the
19 introduction of evidence and argument regarding Plaintiff's
20 convictions prior tot eh incident and Plaintiff's convictions after the
21 incident with respect to charges brought in connection with other
22 incidents. These motions will be based upon California Evidence
23 Code, section 352.

24 (i) Issues of Law

25 Other than the ultimate issues at dispute in this case, Plaintiff is not
26 aware of any issues of law to be decided by the Court.

1 (j) Bifurcation of Issues

2 Plaintiff does not seek bifurcation of issues but has been advised
3 the Defendants seek bifurcation of the liability of the entity defendants
4 from the individual defendants.

5 (k) Jury Trial

6 The parties have requested a jury trial.

7 (l) Attorney Fees

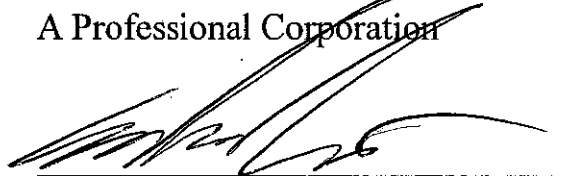
8 Plaintiff is entitled to attorney fees. Defendants have also indicated
9 that they will attorney.

10 (m) Abandonment of Issues

11 None of the claims or defenses have been dismissed or abandoned as
12 of the date of this memorandum (May 21, 2012).

13
14
15 Dated: May 21, 2011

LAW OFFICES OF MANUEL H. MILLER
A Professional Corporation

17
18
19 

20 Michael Coletti
21 Attorney for Plaintiff
22 PRESTON SMITH
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
UNITED STATES DISTRICT COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NAME: PRESTON SMITH V. CITY OF BURBANK, ET AL.
CASE NUMBER: CV10-8840-VBF (AGR_x)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 20750 Ventura Blvd, Suite 440, Woodland Hills, CA 91364.

On May 21, 2012, I served the foregoing document described as:
MEMORANDUM OF CONTENTIONS OF FACT AND LAW OF PLAINTIFF
PRESTON SMITH, in this action by placing a true copy thereof in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] BY MAIL

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Woodland Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing the affidavit.

[X] FEDERAL

I declare that I am employed in the office of a member of the bar of this Court at whose direction that service was made.

Executed on May 21, 2012, at Woodland Hills, California



Maryam Rance

1 Dennis A. Barlow, City Attorney
2 Juli C. Scott, Chief Assistant City Attorney
3 Carol A. Humiston, Senior Asst. City
4 Attorney
5 Office of the City Attorney
6 275 E. Olive Avenue
7 P.O. Box 6459
8 Burbank, CA 91510-6459

Attorneys for Defendants

8 David D. Lawrence, Esq.
9 Dennis M. Gonzalez, Esq.
10 Nathan A. Oyster, Esq.
11 Lawrence Beach Allen & Choi, PC.
12 100 W. Broadway, Suite 1200
13 Glendale, CA 91210-1219
14 Tel: 818-545-1925
15 Fax: 818-545-1937

Attorneys for Defendant